IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

WILLIAM EDWARD REBROOK III,

Petitioner,

v. **CASE NO. 2:93-cr-00151**

UNITED STATES OF AMERICA,

Respondent.

RESPONSE OF UNITED STATES TO
PETITION FOR A WRIT OF ERROR CORAM NOBIS

The court should deny the petitioner's motion for coram nobis. Such extraordinary relief is only granted to correct errors of the most fundamental character, and "only under circumstances compelling such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511-12 (1954). In addition, a petitioner bears the considerable burden of overcoming the presumption that previous judicial proceedings were correct. *Id.* Moreover, where, as here, a petitioner raises a claim that he did not raise on direct appeal, it falls to him to show cause for the default, or to demonstrate that he is actually, factually innocent of the charges brought against him. *Bousley v. United States*, 523 U.S. 614, 624 (1998).

In this case, the record below makes clear that the petitioner ("defendant") was charged with and that the jury convicted him of defrauding the State of West Virginia and the West Virginia Lottery of property[1], that is, certain confidential information that had come into his hands in his capacity as attorney for the Lottery and which he was under a duty to protect. This theory of wire fraud was approved by the Supreme Court in *Carpenter v. United States,* 484 U.S. 19 (1987), and is unaffected by the recent decisions in *Skilling v. United States,* 130 S.Ct. 2896 (2010), and *Black v. United States*, 130 S.Ct. 2963 (2010), and the other cases on which defendant relies. Thus, the record here assures the Court that no error at all is apparent, much less fundamental error. Moreover, the jury's guilty verdicts in this case preclude any finding that the defendant is "actually innocent" of the charges brought against him. No relief is warranted.

I. FACTS

A. The Offense Conduct[2]

The defendant, at the time of his crimes, was the attorney for the West Virginia Lottery Commission. In that capacity, he associated with Elton "Butch" Bryan, who was then the Commissioner of the Lottery. Through Bryan, ReBrook learned that the governor of West Virginia secretly intended to expand video-lottery throughout the State of West Virginia after the upcoming election. Bryan further informed the defendant that —- despite rules for the unbiased awarding of such contracts — the Lottery Commission would award an exclusive contract to Video Lottery Consultants (VLC) to provide video lottery machines throughout West Virginia upon that expansion. By virtue of his position as attorney for the Lottery, the defendant also acquired certain other non-public information concerning the price for shares in VLC. The defendant thereupon used "all of his available funds" to buy shares in VLC for himself, and passed this confidential information along to two friends, who also purchased shares in the company.

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[1]It may well be - and indeed seems likely - that the jury convicted the defendant under the "honest services" theory charged in the mail fraud count as well but, given the record, it is inescapable that the jury found defendant guilty of engaging in a scheme to defraud the State of property, that is, confidential, inside information relating to certain corporate stock.

[2]The facts recited here are taken from the Fourth Circuit's opinion in the defendant's direct appeal. *United States v. ReBrook*, 58 F.3d 961, 963-64 (1995).

B. The Charges

Defendant was indicted[3] on two counts. Count One, the wire fraud count[4], charged the defendant with engaging in a scheme to defraud his employer of his honest services and, alternatively, of property, that is, certain confidential information relating to the price of corporate stock, and with making use of an interstate wire transfer in furtherance of that scheme. Count Two charged the defendant with engaging in the same scheme[5] (the language charging the scheme is incorporated by reference from Count One) and with purchasing securities in interstate commerce in connection with that scheme, in violation of 15 U.S.C. §§ 78ff and 78j(b) and 17 CFR § 240.10b-5.

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[3]A copy of the Indictment is attached as "Exhibit A."

[4]See 18 U.S.C. §§ 1343 and 1346.

[5]Charging wire fraud and securities fraud based on the same transaction was not multiplicitous. *United States v. ReBrook*, 58 F.3d 961, 967 (4th Cir. 1995) (". . . there is no multiplicity

C. The Instructions

The defendant asserts in his Petition that the jury "was instructed only on this honest services theory." Petition at p. 8. But the trial court specifically instructed the jury that the term "scheme and artifice" as used in the wire fraud statute would:

> include any plan or course of action intended to deceive others and to obtain by false or fraudulent pretenses money or property from the person or entity so deceived . . .

Tr. at p.588.[6]

Only thereafter did the court add that such a scheme or artifice "includes also a scheme or artifice to deprive another of the intangible right of honest services." Tr. at p. 589. (The quoted portions of the jury charges are attached as "Exhibit B.") In the definition section of the charge, the court again reminded the jury that a scheme to defraud may be to obtain money or property from another or to defraud someone or some entity of honest services due them. Tr. at p. 594. Thus, both the property

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issue when prosecuting the same purchase or sale of securities under both the securities fraud statute and the wire fraud statute.")

[6]References to trial transcript shall be designated as "Tr. at p. ___."

and honest services theories of wire fraud were charged in the Indictment and were given to the jury in instructions.

D. The Proceedings

Defendant was convicted by jury on both counts. He appealed and the Fourth Circuit Court of Appeals reversed his conviction on Count Two, having rejected in *United States v. Bryan,* 58 F.3d 933 (4th Cir. 1995), a companion case, the so-called "misappropriation theory" of securities fraud under which defendant was charged.

At the time of defendant's direct appeal, the Supreme Court had not directly ruled on the "misappropriation theory," having divided 4-4 on the issue in *Carpenter v. United States*, 484 U.S. 19 (1987). The Supreme Court has since, however, expressly abrogated *United States v. Bryan*, and held that the misappropriation theory under 15 U.S.C. § 10(b) is legally viable:

> We address first the Court of Appeals' reversal of O'Hagan's convictions under § 10(b) and Rule 10b-5. Following the Fourth Circuit's lead, *see United States v. Bryan*, 58 F.3d 933, 943-959 (1995), the Eighth Circuit rejected the misappropriation theory as a basis for § 10(b) liability. We hold, in accord with several other Courts of Appeals, that criminal liability under § 10(b) may be predicated on the misappropriation theory.

United States v. O'Hagan, 521 U.S. 642, 649-650 (1997)

Thus, the defendant's conviction on Count Two, where he was properly charged with and the jury was properly instructed on the misappropriation theory of securities fraud, was, contrary to the Fourth Circuit's ruling, legally sound and should have been affirmed.

The conviction of the defendant on Count One, the wire fraud count, was affirmed. Defendant's petition for certiorari was denied. *ReBrook v. United States*, 516 U.S. 970 (1995).

II. DISCUSSION

A. The "Property" Fraud Theory Charged in the Wire Fraud Count is Unaffected by *Skilling* and *Black*.

The defendant here argues that *United States v. Mandel,* 862 F.2d 1067 (4th Cir. 1988), requires this Court to set aside his conviction since "[t]he only theory asserted by the United States against Petitioner on the wire fraud count was that Petitioner had denied the public of honest services." Petition, at p. 5.[7] This is false. The wire fraud count here at issue charged the defendant with alternative theories of criminality. In addition to the honest services theory, defendant was charged with devising and executing a scheme and artifice:

> to defraud the State of West Virginia and the West Virginia Lottery of certain property, that being certain confidential nonpublic information.

Indictment, Count One, paragraph 11(b).

The proposition that certain kinds of information (in this case, confidential information relating to certain corporate stock prices) constitute property within the meaning of the mail and wire fraud statutes was affirmed by the Supreme Court immediately following the decision in *McNally v. United States,*[8] 483 U.S. 350 (1987). In *Carpenter v. United States*, 484 U.S. 19 (1987), the defendant was charged with and convicted of defrauding his employer of confidential information. On appeal, he argued that "information," being intangible, could not constitute "property" within the meaning of the mail and wire fraud statutes and, thus, his convictions, under the rule in *McNally* must be reversed. The Court in *Carpenter* unanimously[9] disagreed:

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[7]References to defendant's Petition for Writ of Error Coram Nobis shall be designated as "Petition at p. ____."

> This is not a case like *McNally*, however . . . . Here, the object of the scheme was to take the Journal's confidential business information . . . and its intangible nature does not make it any less "property" protected by the mail and wire fraud statutes. *McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.
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> . . . Confidential business information has long been recognized as property.

Id. at 25-26.

In ReBrook's direct appeal, the Court Circuit expressly noted *Carpenter's* "property" theory as a basis for the charge and affirmed defendant's wire fraud conviction. *ReBrook*, 58 F.3d at 967.

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[8]The Court in *McNally* held that the "mail fraud statute did not prohibit schemes to defraud citizens of their intangible rights to honest and impartial government," *Id.* at 355, and that the statute is "limited in scope to the protection of property rights." *Id.* at 360. *Carpenter* at 320.

[9]Although the Court in *Carpenter* affirmed the wire fraud charges (15 U.S.C. § 78j(b) and Rule 10b-5, 17 CFR § 240.10b-5 (1987)) by an even 4-4 split, the mail and wire fraud charges were unanimously affirmed.

The holding in *Carpenter* is unaffected by the rulings in *Skilling* and *Black* for exactly the same reasons that it is distinguished from *McNally.* *Skilling* and *Black* were concerned with "honest services" charges that were predicated on 18 U.S.C. § 1346, the so-called "*McNally* fix." *Skilling* and *Black* hold that, to come within the meaning of § 1346, schemes charged under "honest services" theories cannot simply involve an undisclosed conflict of interest, but must include bribery or kickbacks. Neither *Skilling* nor *Black* address or purport to draw a distinction between tangible and intangible property rights. Neither case affects the rule in *Carpenter* upon which the United States alternative theory in the wire fraud count here was based.

B. *Mandel* Distinguished

Moreover, the alternative "property" fraud theory charged in the fraud count also distinguishes this case from *United States v. Mandel*, 862 F.2d 1067 (1988), where the indictment charged only an "honest services" theory. Although the indictment there charged that Mandel had received money as a result of the scheme, it did not charge Mandel with defrauding anyone of property. The Fourth Circuit noted the importance of this distinction in its decision:

> *McNally* does not allow a mail fraud conviction merely on the finding that those charged received *any* property in connection with the scheme; *McNally* requires a finding

> that the scheme *defrauded* or *intended to defraud* someone of money or property.

Mandel, 862 F.2d at 1072 (emphasis in original).

Again, the Indictment in this case included a charge that defendant defrauded his employer of property. Thus, defendant's reliance on *Mandel* is misplaced.

C. Collateral Review

1. Because defendant did not raise a vagueness claim on direct appeal, he must demonstrate that he is actually innocent of all charges to obtain relief under coram nobis.

As noted above, review under coram nobis is always strictly limited and relief is only granted when necessary to correct a manifest injustice. *United States v. Morgan*, 346 U.S. 502 (1954). Where a defendant fails to raise a claim on direct appeal, coram nobis review of that claim is conducted under an even stricter standard. *United States v. Osser*, 864 F.2d 1056, 1060-61 (3rd Cir. 1988).[10]

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[10]While it is generally agreed that the already limited scope of review under coram nobis is even further restricted by procedural default, there is some variation in language defining that limitation among the circuits. Compare *Foont v. United States*, 93 F.3d 76, 79 (2nd Cir. 1996), demanding a showing that "sound reasons exist for failure to seek appropriate earlier relief" and *Hager v. United States*, 993 F.2d 4, 5 (1st Cir. 1993) requiring "an explanation of why [] petitioner did not earlier seek relief from the judgment" with *United States v. Swindall*, 107 F.3d 831, 836 (11th Cir. 1997) and *United States v. Bustillos*, 31 F.3d 931, 934 (10th Cir. 1994) requiring showing of "cause and prejudice."

Thus, this case is further distinguished from *Mandel* by its procedural posture. In *Mandel*, the Fourth Circuit noted that Mandel had preserved his right to argue vagueness in coram nobis:

> Plain error [review] also does not enter into this case. Mandel has been making the same *McNally* objection to the indictment and charge in this case, directly and inferentially, ever since he was indicted in 1975.

Id. at 1073.

Unlike Mandel, the defendant here has not preserved the vagueness issue. In fact, on direct appeal, the Fourth Circuit specifically noted that defendant did not raise a vagueness argument:

> ReBrook's appeal concerning the wire fraud count is narrow in scope. For example, ReBrook does not challenge 18 U.S.C. Section 1346, which defines a "scheme or artifice to defraud" under the wire fraud statute as including deprivation of "another of the intangible rights of government," as being unconstitutionally vague.

ReBrook, 58 F.3d at 967.

In *Osser*, the court refused post-*McNally* coram nobis relief where the indictment charged both honest services and property theories in mail fraud count. There, as here, the defendant had failed to raise the vagueness argument on direct appeal. The court articulated reasons for limiting review under coram nobis:

> In a coram nobis case, by contrast [to a habeas corpus case], where sentence has been served and nothing remains but some financial detriment, judicial incentive to excuse compliance with procedural prerequisites is of a lower order.

Osser, 864 F.2d at 1060.

> The issue that Osser brings at this late date should have been included in his direct appeal; to now excuse his failure to exhaust direct appellate procedures would disproportionately harm the prosecution.

Id. at 1062.

Although the Fourth Circuit has not published a decision on this point, unreported decisions adhere to the bright line of *Osser*. *See United States v. Wilson*, 77 F.3d 472, 1996 WL 71098 (4th Cir. Feb. 7, 1996) (unpublished)(citing *United States v. Keane*, 852 F.2d 199, 202 (7th Cir. 1988) for the proposition that "claims that could have been raised by direct appeal are outside scope of writ of error coram nobis.") and *Walton v. United States*, 2005 WL 1334584 (N.D. W. Va. May 6, 2005) (Keeley, J.) citing *Keane* and *Osser*, for the same proposition.

Because defendant did not raise this argument on direct appeal, he may raise it here on collateral review only by showing "both 'cause' and 'actual prejudice'" on the one hand, *Murray v. Carrier,* 477 U.S. 478, 503 (1986); *Wainwright v. Sykes,* 433 U.S. 72, 87 (1977), or that he is "actually innocent" on the other. *Murray* at 496.

a. Defendant's Failure to Raise His Vagueness Claim on Direct Appeal Constitutes Procedural Default.

Defendant here cannot demonstrate cause. The Supreme Court has ruled that a petitioner may have "cause" for such a default where the claim in question "is so novel that its legal basis is not reasonably available to counsel. . . ." *Reed v. Ross, 468 U.S. 1 (1984).* Inasmuch as defendant here argued the "vagueness" challenge to Section 1346 to the trial court, it is impossible for him to claim here that it was "novel" or that it was unavailable to him on direct appeal. *See United States v. ReBrook,* 837 F. Supp. 162, 169 (S.D. W.Va. Oct. 26, 1993) (defendant "also challenges on vagueness grounds the "honest services" standard set forth in 18 U.S.C. § 1346. . . .") and *United States v. ReBrook*, 842 F. Supp. 891, 894 (S.D. W. Va. Jan. 19, 1994) ("Defendant asserts the Court erred in allowing the government to establish wire fraud by alleging Defendant devised a scheme to defraud West Virginians of their 'intangible right to honest services,' 18 U.S.C. § 1346, because the concept is unconstitutionally vague.")

Thus, to overcome his procedural default, defendant here must show that he is actually innocent. That is, he must show that "'in light of all the evidence,'" "it is more likely than not that no reasonable juror would have convicted him," *Schlup v. Delo*, 513 U.S. 298 (1995), under either theory charged in the count. *Bousley v. United States*, 523 U.S. 614, 624 (1998).

In *Bousley,* where the defendant made collateral attack on a conviction obtained through a guilty plea, the Court noted that he would have to prove himself actually innocent not only of the charge to which he pled, but of any charges the prosecution might have foregone in plea negotiations. Indeed, the Court only refused to require the defendant to prove he was innocent of "carrying" as opposed to merely possessing a firearm because "there is no record evidence that the Government elected not to charge petitioner with 'carrying' a firearm in exchange for his plea of guilty." 523 U.S. at 624 In this case there is no such ambiguity. The prosecution did charge defendant with wire fraud under a "property" theory. Thus, to prevail here, the defendant must show himself to be "actually innocent" of that charge. Moreover, it is not inconsistent with the logic of *Bousley* that, to establish that defendant has been the victim of an injustice and to avail himself of the extraordinary relief under coram nobis in his position of procedural default, he would also have to prove himself "actually innocent" of the securities fraud charge in Count Two. In light of *O'Hagan*, we know that the wire fraud count here was a valid charge. Given the jury's guilty verdict on that charge, it is far less speculative than potential charges that might have been bargained away in plea negotiations that *Bousley* holds that a coram nobis petitioner must show himself innocent of. In this equitable context, the unmerited windfall of the erroneous reversal of the defendant's conviction on the securities fraud charge is of no moment.

In this case, it simply cannot be shown that no reasonable juror would have convicted the defendant of a validly-charged crime on the evidence presented when the record clearly demonstrates that the jury did exactly that. The only breach of the defendant's duty that is alleged in the "honest services" prong of the count is the defrauding of the State and the Lottery of the confidential information that is the object of the "property" fraud theory of that count. That is, defendant breached his duty of "honest services" precisely by misappropriating the confidential information that is the basis for the property theory charged in Count One. Thus, unless the jury had been convinced that defendant had defrauded the State and the Lottery of this confidential information, they could not have found him guilty of Count One under either theory charged.

The guilty verdict on Count Two provides further assurance that the jury accepted the "property" fraud theory charged in Count One. The securities fraud scheme charged in Count Two is the same scheme as charged in Count One. The object of the securities fraud scheme is the misappropriation of the same confidential information that is the sole object of the "property" fraud theory charged in Count One. Thus, the jury could not have found the defendant guilty of Count Two unless they had agreed that defendant had defrauded the State and the Lottery of the confidential information that is charged in the property fraud theory of Count One.

2. Even if defendant were not in a position of procedural default, he should not be granted relief under coram nobis, because there is a "high degree of probability" that the jury convicted him under the valid "property" fraud theory charged in Count One

Where a defendant has been convicted on a charge alleging alternative theories of guilt and where one of those theories may be later shown to be invalid or unsupported, the conviction will nonetheless survive on review where the record shows a "high degree of probability" that the jury convicted on a viable theory. *United States v. Alexander*, 748 F.2d 185, 189 (4th Cir. 1984) (affirming Alexander's conviction because, even if the evidence were insufficient to support one of the theories of guilt alleged, the verdict was supportable because of the sufficiency of the evidence on the alternate theory of prosecution); *Brooks v. Leeke*, 894 F.2d 401, 1990 WL 2332 (4th Cir. Jan. 16, 1990) (a*pplying Stromberg v. California*, 283 U.S. 359 (1931) and denying relief under 28 U.S.C. § 2254 because there was a "high degree of probability" that the jury relied on a valid charged theory; and the court was consequently "not uncertain" that the jury based its verdict, at least in part, on a proper ground.)

In order to evaluate the actions of the jury in such cases, reviewing courts make a "practical assessment of the record," looking not only to the evidence adduced at trial, but also considering the verdicts of the jury on accompanying and related charges. *United States v. Tresvant*, 677 F.2d 1018, 1024 (4th Cir. 1982) (Phillips, J. concurring); *see also United States v. Alexander*, 748 F.2d at 189 ("Thus, while the jury convicted on Counts 1-5, 8 and 11, [the contested counts] . . . it also convicted on Counts 6, 7 and 9 . . . Additionally, the jury's failure to convict on Counts 37 and 38 is telling. . . .").

3. The record demonstrates more than a high degree of probability that the jury convicted defendant under the "property" theory charged in Count One, the wire fraud count.

a. The jury could not have convicted the defendant on Count One, even under the "honest services" theory, unless they had found that he had defrauded the State of property.

The wire fraud scheme charged in Count One of the Indictment charges defendant with the misuse of confidential information that came into his possession by virtue of his position as attorney for the Lottery Commission. Every act charged against the defendant in the wire fraud scheme involved his exploitation and personal conversion of the confidential information that is the object of the "property" theory. That is, the only way that the Indictment charges that defendant defrauded the State of his honest services is through his misuse and conversion of that information. Thus, the jury could not have convicted defendant, even under the "honest services" theory, unless they had found that he defrauded the State of that property, that is, the confidential information that is the object of the alternative "property" theory in that count. Such assurance is alone enough to sustain the conviction here. *See United States v. Jacobs*, 475 F.2d 270, 283-84 (2nd Cir. 1973) (upholding guilty verdict where jury was instructed under one erroneous theory and one valid theory, because "[w]hether the jury found [defendants] guilty on the first theory submitted to it, or on the second, or on both, there is thus no uncertainty that the jury found every fact necessary for a valid conviction.") *Jacobs* is cited with approval by the Fourth Circuit in *Alexander* on this point. *Alexander*, 748 F.2d at 189.

Boatwright v. United States, 779 F. Supp. 383 (D. Md. 1991), is almost identical to the case at hand. In that case, as in this one, the defendant was charged with alternative theories of mail fraud — an "honest services" theory and a property theory. After the *McNally* and *Mandel* decisions, *Boatwright* made collateral attack on his conviction under coram nobis, arguing that the presence of the honest services theory in the indictment rendered his conviction void. The court disagreed, finding ample evidence in the record to show a "high degree of probability" that the jury convicted under the alternative property fraud theory in the indictment, irrespective of whether they convicted under the invalid "honest services" theory or not. The court stated, "[t]he facts of this case almost compel the conclusion that the jury found the *Boatwrights* guilty of depriving the Church of its money, regardless of whether the jury also found that [they] violated their duty of loyalty to the Church." *Id.* at. 384. The assurance of the jury's agreement on the property fraud theory is even stronger in this case, given the near complete overlap of the two theories charged in Count One and the similar overlap between the securities fraud theory in Count Two and the property theory in Count One.

b. The jury could not have convicted the defendant on Count Two unless they had found that defendant had defrauded the State of property as charged under the "property" theory in Count One.

The jury's guilty verdict on Count Two is conclusive evidence that the jury agreed that the defendant had defrauded his employer of property as charged in Count One, that is, the confidential information about certain corporate stock. In fact, the same scheme is charged in Counts One and Two. The scheme is actually charged in detail in eighteen of the nineteen paragraphs of Count One (paragraph 19 charges the wire transfers necessary only to the wire fraud charge) all eighteen of which are incorporated by reference into Count Two. The court instructed the jury that in order to return a guilty verdict on Count Two, they must find that defendant used the charged scheme "to misappropriate non-public information," Tr. at p. 593, and that such misappropriation "in the context of this case means to wrongfully take and use the information in violation of some fiduciary or special duty to hold the information in confidence.” Tr. at p. 594. The Indictment leaves no doubt about what that information is. As charged in Count One and Count Two, it is the same - the confidential information relating to the price of certain corporate stock. Thus, in order for the jury to find the defendant guilty of Count Two, they had to find that he engaged in a scheme to misappropriate the very property that is the subject of the property theory charged in Count One.

As charged and as presented to the jury, the securities fraud scheme required the same proof that the property theory under the wire fraud charge in Count One required, except for the interstate use of a wire transmission. Therefore, it would have been impossible for the jury to return their guilty verdict on Count Two if they had not concluded that he had schemed to defraud his employer of property, that is, the very confidential information described in Count One which was the object of the property theory charged in that count.

III. CONCLUSION

The Court should deny defendant's petition. This record provides more than ample assurance that the defendant was charged under a valid wire fraud theory, and that he was convicted under that same theory. The evidence supporting that conclusion is stronger and more compelling here than in other cases where coram nobis relief was denied. Additionally, defendant, given the jury's verdicts, simply cannot argue that he is "actually innocent" of the wire fraud charges under the "property" theory. Thus, there is no injustice here, and no justification for extraordinary relief under coram nobis.

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing "RESPONSE OF UNITED STATES TO PETITION FOR A WRIT OF ERROR CORAM NOBIS" has been electronically filed and service has been made on opposing counsel by virtue of such electronic filing this the 7th day of October, 2010, to:

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